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# Grandbase Sdn Bhd v Pioneer Concrete Services (M) Sdn Bhd & Anor

B HIGH COURT (KUALA LUMPUR) — CIVIL NO D4–22–3498 OF 1998
ABDUL WAHAB PATAIL J
22 JANUARY 2007

C *Contract — Collateral contract — Joint venture agreement — Whether JVA had become null and void and unenforceable against defendants due to non-fulfilment of conditions precedent — Whether defendants waived those conditions precedent — Parties had in fact commenced upon business activity as envisaged in joint venture*

D

On 29 November 1991, the plaintiff and one Fijar Sdn Bhd ('Fijar') entered into a Joint Venture Agreement ('JVA') with the first defendant, Pioneer Concrete Services (M) Sdn Bhd ('PCSM'). The second defendant, Pioneer Concrete (M) Sdn Bhd ('PCM') was incorporated to be the joint venture vehicle. The defendants raise the following issues: (i) whether all the conditions precedent under the JVA have been E fulfilled; (ii) whether the JVA has become null and void and unenforceable against the defendants due to the non-fulfilment of the conditions precedent in the JVA by the plaintiff. The plaintiff averred that they signed the JVA relying on the representations made by the defendants that they agree to waive the conditions precedent which required approval for Pioneer Industries Ltd ('PIH') to hold 100% F of PCSM and in turn for PCSM to hold 60% of PCM as long as PCSM was allowed to beneficially own 60% PCM and how they held the shares would be left to them, and PCSM agreed to be bound by the Industrial Coordination Act 1975 and the Guidelines thereunder and such approvals that shall be given by the Government. With this condition being waived the JVA can become effective and binding upon the parties. The defendants maintained that they did not waive those conditions G precedent. That the plaintiff and Fijar were at all material times represented by solicitors and all changes and variations made to the JVA were made in writing after being properly advised by solicitors and even if assuming purported waiver existed, whether it is valid and binding on the defendants.

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**Held**, allowing plaintiff's claims:

(1) The pre-condition that PIL be allowed to hold 100% of PCSM which would in turn hold 60% of PCM would effectively allow PIL to hold 60% of PCM I directly. The interest of PIL was the production of pre-mixed concrete. Stepping back from the arguments by the parties, it is clear there is no suggestion that as a result of the alleged failure of plaintiff to deliver upon the preconditions fully, PIL had been unable through the defendants to undertake the production and supply of pre-mixed concrete. In all events, the plaintiff did deliver on a substantial number of carrier licenses. PIL and the defendants in

effect enjoyed the opportunity and occasion to participate in the production and supply of pre-mixed concrete. By shutting out the plaintiff from the joint venture on the grounds of failure to deliver upon the pre-conditions, the PIL would have, in the time the business operated, not only 100% control of PCSM but also PCM, without the statutory approvals. As has been made clear by the response of MITI dated 22 June 1992, it required that 70% of PCM be held by Malaysians (see para 15).

(2) While it is true that the joint venture as envisaged under the JVA could not be put into effect, PIL and the defendants were nevertheless able, under the guise of the structuring of the joint venture to embark upon the production and supply of pre-mixed concrete, with the efforts of the plaintiff to obtain approvals. Regardless of the fact of the absence of compliance with preconditions mandated by law, the parties had in fact commenced upon the business activity as envisaged in the joint venture. For so long as that business was carried out by PIL and the defendants, PIL and the defendants cannot deny the plaintiff the share it would be entitled to if the approvals had been obtained (see para 16).

**[Bahasa Malaysia summary**

Pada 29 November 1991, plaintif dan satu Fijar Sdn Bhd ('Fijar') memasuki satu Perjanjian Usahasama ('PU') dengan defendan pertama, Pioneer Concrete Services (M) Sdn Bhd ('PCSM'). Defendan kedua, Pioneer Concrete (M) Sdn Bhd ('PCM') telah ditubuhkan sebagai jentera usahasama tersebut. Defendan-defendan membangkitkan isu-isu: (i) sama ada kesemua pra syarat di bawah PU tersebut telah dipenuhi; (ii) sama ada PU tersebut telah menjadi tak sah dan terbatal dan tidak dapat dikuatkuasakan terhadap defendan-defendan oleh kerana pra syarat di dalam PU tersebut tidak dipenuhi oleh plaintif. Plaintif menyatakan bahawa mereka telah menandatangani PU tersebut berdasarkan representasi-representasi yang dibuat oleh defendan-defendan bahawa mereka bersetuju untuk mengenepikan pra syarat yang memerlukan kebenaran untuk Pioneer Industries Ltd ('PIH') memegang 100% di PCSM dan dari situ untuk PCSM memegang 60% di PCM selagi PCSM dibenarkan untuk memiliki secara benefisial 60% di PCM dan bagaimana mereka memegang saham-saham tersebut terpulang kepada mereka, dan PCSM bersetuju untuk terikat dengan Akta Penyelarasan Perindustrian 1975 dan garis panduan di bawah Akta tersebut dan sebarang kebenaran-kebenaran yang akan diberikan oleh Kerajaan. Dengan syarat ini diketepikan PU dapat mengikat dan berkuat kuasa ke atas pihak-pihak. Defendan-defendan menegaskan bahawa mereka tidak mengetepikan pra syarat tersebut. Pada kesemua masa material, plaintif dan Fijar diwakili oleh peguamcara dan segala perubahan atau pindaan terhadap PU tersebut dilakukan secara bertulis dan walaupun sekiranya dianggap bahawa pengenepian tersebut wujud, samada ia sah dan mengikat defendan-defendan.

**Diputuskan**, membenarkan tuntutan plaintif:

(1) Pra syarat bahawa PIL dibenarkan untuk memegang 100% di PCM di mana ia kemudiannya memegang 60% di PCM akan secara berkesan membenarkan

PIL memegang 60% di PCM secara langsung. Kepentingan PIL adalah penghasilan konkrit pra-campur. Berundur daripada pertikaian-pertikaian pihak-pihak, adalah jelas bahawa tiada cadangan bahawa disebabkan kegagalan plaintif untuk memenuhi pra syarat tersebut, PIL tidak dapat melalui defendan-defendan menjalankan pengeluaran dan bekalan konkrit pra campur. Dalam apa juga keadaan, plaintif telah dapat serahkan dengan banyak lessen-lesen pengangkutan. PIL dan defendan-defendan sebenarnya menikmati peluang dan kesempatan menyertai penghasilan dan pembekalan konkrit pra campuran. Dengan menyingkirkan plaintif daripada usahasama tersebut atas alasan kegagalan plaintif dalam memenuhi pra syarat, PIL akan, dalam masa perniagaan tersebut berfungsi, bukan sahaja 100% kawalan ke atas PCSM tetapi juga PCM, tanpa kebenaran-kebenaran statutori. Seperti yang telah dijelaskan melalui surat MITI bertarikh 22 Jun 1992, yang mengkehendaki 70% di PCM dipegang oleh warganegara Malaysia (lihat perenggan 15).

(2) Sementara itu adalah benar bahawa, usahasama seperti yang dijangkakankan di bawah PU tersebut tidak dapat dilaksanakan, PIL dan defendan-defendan telah walaubagaimanapun dapat, di bawah samaran penstrukturan usahasama tersebut telah memulakan penghasilan dan pembekalan konkrit pra campuran, melalui usaha plaintif mendapatkan kebenaran-kebenaran. Tanpa mengambil kira fakta ketidakpatuhan akan pra syarat yang di mandatkan oleh undang-undang, pihak-pihak telah sebenarnya memulakan kegiatan perniagaan seperti yang diniatkan oleh usahasama tersebut. Selagi perniagaan tersebut dijalankan oleh PIL dan defendan-defendan, PIL dan defendan-defendan tidak boleh menafikan plaintif perkongsian yang ia berhak kepada sekiranya kebenaran-kebenaran tersebut telah diperolehi (lihat perenggan 16).]

**Notes**

For a case on joint venture agreement, see 3(2) *Mallal's Digest* (4th Ed, 2002 Reissue) para 2639.

**Cases referred to**

*Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 (refd)

**Legislation referred to**

Commercial Vehicles Licensing Board Act 1987
Industrial Coordination Act 1975

*PS Gill (Mankiranjit Kaur, Mahinder Singh & Harjit Singh Pannu with him) (Gill & Tang) for the plaintiff.*
*YM Cheong (YB Tan & CW Teo with him) (Khaw & Partners) for the defendants.*

**Abdul Wahab Patail J:**

THE PARTIES

**[1]** On 29 November 1991, the plaintiff and one Fijar Sdn Bhd ('Fijar') entered into a joint venture agreement ('JVA') with the first defendant, Pioneer Concrete

Services (M) Sdn Bhd ('PCSM'). The second defendant, Pioneer Concrete (M) Sdn Bhd ('PCM') was incorporated to be the joint venture vehicle. The shareholding of the plaintiff Grandbase Sdn Bhd ('Grandbase') is held by one Siti Bidayah binti Ahmad and Chuah Eng Chuen @ Alex Chua ('PW3') in the proportion of 60% and 0% respectively.

THE DEFENDANTS' SUBMISSIONS

**[2]** The defendants submit that cl 2.1 of the JVA provides that the JVA was subject to conditions precedent ('conditions precedent'):

(a) Clause 2.1.1: the grant/issue before the 180th day from the date of the JVA ie, 27 May 1992 ('conditional date') of the following approvals:

  (i) All appropriate approvals (including approval from the Foreign Investment Committee ('appropriate approvals') to the holding by the PCSM of 60% of the total issued capital of PCM;

  (ii) All licences, permits, consents and the like ('requisite licences') which are required by the PCM to carry on the manufacture of pre-mixed concrete including a manufacturing licence under the Industrial Coordination Act, 1975;

  (iii) The approval by the Ministry of Domestic Trade & Industry (hereinafter referred to as 'the said Ministry' and the said approval referred to as 'the ministry's approval') to two agreements, namely:

    (a) Technical Services Agreement between the PCM and Pioneer International Ltd ('PIL'); and

    (b) Management Services Agreement between the PCM and PIL;

(b) Management Services Agreement between the PCM and PIL;

  (i) 20 Carriers Licences within 14 days from the date of the JVA ie, 13 December 1991;

  (ii) 20 Carriers Licences within 90 days from the date of the JVA ie 27 February 1992; and

  (iii) 50 Carriers Licences before the Conditional Date ie, 27 May 1992.

(c) Clause 2.1.3: the grant of the approval by the Foreign Investment Committee ('FIC Approval') before the conditional date ie, before 27 May 1992, for PCSM to hold the 60% of the issued capital of the PCM.

**[3]** They also submit that according to cll 2.2 to 2.6 of the JVA, applications for the appropriate approvals, requisite licences, Ministry's approval, issuance of the carriers licences and FIC approval were to be made within 21 days from the date of the JVA (the 21-day period ended on 20 December 1991) and Fijar and the Plaintiff were to provide all such information, assistance and/or advice as may be required for obtaining the applicable approvals and licences:

(a) The approval by the Foreign Investment Committee ('FIC') would be deemed not to be granted and the condition precedent specified in cl 2.1.1(i) of the JVA would be deemed unfulfilled if the FIC refused or did not grant its approval before the conditional date (ie, before 27 May 1992).

(b) The requisite licences would be deemed not to be granted and the condition precedent specified in cl 2.1.1(ii) of the JVA would be deemed to be unfulfilled if the said Ministry refused or did not grant the Manufacturing Licence before the Conditional Date (ie, before 27 May 1992).

(c) The Ministry's approval would be deemed not to be granted and the condition precedent specified in cl 2.1.1(iii) of the JVA would be deemed to be unfulfilled if the said Ministry refused or did not grant the Ministry's approval before the conditional date (ie, before 27 May 1992 or if an approval to the technical services agreement and/or the management services agreement were granted by the said Ministry upon terms and conditions which were unacceptable to the PCM and/or PIL.

(d) The carriers licences would be deemed not to be granted and the conditional precedent specified in cl 2.1.2 of the JVA would be deemed to be unfulfilled if the Commercial Vehicles Licensing Board refused or did not issue ail or any of the carriers licences referred to in cll 2.1.2 (i) to 2.1.2 (iii) of the JVA before the respective dates therein specified or the carriers licences referred to in clauses 2.1.2 (i) to 2.1.2 (iii) of the JVA were issued before the respective dates specified therein upon terms and conditions which were unacceptable to the PCM.

(e) FIC approval would be deemed not to be granted and the condition precedent specified in cl 2.1.3 of the JVA would be deemed unfulfilled if the FIC refused or did not grant the FIC approval before the conditional date (ie, before 27 May 1992) or if an approval to the holding by PCSM of 60% of the total issued capital of PCM from time to time was granted by the FIC before the Conditional Date (ie before 27 May 1992) upon terms and conditions which were unacceptable to PCSM.

**[4]** The defendants submit that JVA also provided that within 14 days from the receipt of appropriate approvals, requisite licences, Ministry's approval, issuance of the carriers licences and FIC approval, PCM notified all the parties that the terms of the aforesaid approvals are unacceptable to them and upon an appeal to the respective parties granting the approvals, no changes whatsoever is made or PCM is still unwilling to accept the terms of the proposal/proposals, the conditions precedent are deemed not granted and unfulfilled.

**[5]** It was further submitted that cl 2.7 of the JVA provides that if the conditions precedent or any of them were not fulfilled before the respective dates specified in cll 2.1.1 to 2.1.2 of the JVA, the provisions of the JVA (save for the 'Excepted Clauses') would become null and void and of no effect and no party would have any rights hereunder against the other parties, and further thereto, the JVA also provides that:

(a) Within 14 days from the date when all the conditions precedent are fulfilled: A

(i) That PCM's issued and paid-up capital would be increased to RM3,000,000 with the issuance of 1,000,000 new: Clause 5.2 of the JVA;

(ii) That the PCM's issued and paid-up capital would be held as follows: PCSM 60%, Fijar 20%, plaintiff 20%. See cl 5.3 of the JVA; B

(iii) That Fijar and the plaintiff would make unconditional applications to the PCM for the allotments for cash at par of 600,000 and 400,000 of the PCM's shares respectively and the PCSM would sell and transfer to the plaintiff (at a price of RM1 for each share payable simultaneously with the transfer) 200,000 of the PCM's shares (out of the 2,000,000 shares held by the PCSM): Clause 5.4 of the JVA. C

**[6]** They submit the plaintiff covenanted that if its total issued capital ceased to be held by one Chuah Eng Chuen and Siti Bidayah bte Ahmad (and/or such other persons whose holding of shares was consented to in writing by the PCSM prior to their becoming the holders of shares in the plaintiff), the plaintiff would within 90 days from the date of its total issued capital ceasing to be so held make an offer (failing which the plaintiff would be deemed to have made an offer on the 91st day aforesaid) to sell and transfer to the PCSM all of the PCM's shares held by the plaintiff subject to the terms in cl 6 of the JVA: Clause 6.11 of the JVA. D

E

**[7]** The application to the FIC for the appropriate approvals and the FIC approval which was to be made on or before 20 December 1991 was only made on 10 January 1992. The FIC by its letter dated 23 March 1992 notified that its approval was not required as PCM was incorporated to carry on manufacturing activities which required the approval from the Ministry of International Trade and Industry ('MITI'). The plaintiff's and Fijar's solicitors by their letter dated 11 May 1992 agreed that the approval of the FIC for FIC approval was not required but stated that the approval from MITI to the holding by PCSM of 60% of the issued capital of PCM was required in order to fulfil the condition precedent specified in cl 2.1.1(1) of the JVA. On 22 June 1992, MITI issued a letter of approval stating inter alia that 70% of PCM's issued capital needs to be held by Malaysian. The defendants refused to accept the terms in MITI's letter dated 22 June 1992. F G

**[8]** The defendants submit that application for the requisite licences (including the manufacturing licence) and the carriers licences were the responsibility of Fijar and the plaintiff: Clause 2.3 of the JVA; and H

(a) Upon the requests of Fijar and the plaintiff and assented to by the PCCSB, the conditional date was extended three times, namely to 26 June 1992 and later to 15 August 1992 and lastly to 5 September 1992 as the conditions precedent relating to the obtaining of the carriers licences and the manufacturing licence were not fulfilled. I

(b) After the last extension of the conditional date which expired on 5 September 1992:

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(i) PCSM offered to grant a further extension of the conditional date if Fijar and the plaintiff would agree to amend the JVA by substituting the 'consulting services agreement' and the 'consulting and marketing services agreement' with the 'liaison services agreement' and the 'marketing services agreement' respectively;

B

(ii) In accordance with cl 2.7 of the JVA, the JVA was null and void and of no effect since 5 September 1992 and the plaintiff does not have any rights against PCSM under the JVA.

(c) It was confirmed in PCSM and PCM's solicitors' letter to the plaintiffs solicitors that until 25 May 1992, only 35 carriers licences were issued to PCM.

C

(d) PCSM also rejected the plaintiffs proposal to use Malaysian nominees to fulfil MITI's requirement as PCSM considered such act as a scheme to deceive MITI.

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(e) An approval from MITI allowing PCSM a period of two years to dilute its shareholdings in PCM was only issued on 18 December 1992 ie, after the JVA became null and void on 5 September 1992. In any event, what was envisaged in the JVA was a 100% ownership of PCM by PIH.

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(f) On 7 January 1993, PCSM informed Fijar and the plaintiff:

(i) that the conditions in letter dated 18 December 1992 from MITI to PCM pertaining to application for manufacturing licence were unacceptable;

(ii) that should Fijar and the plaintiff wish to further extend the conditional date, the PCSM would be prepared to consider their request;

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(iii) however, PCSM's offers aforesaid, were never accepted by Fijar and the plaintiff.

(g) At all material times, PCM also did not receive a manufacturing licence as required under cl 2.1.1 of the JVA.

G

(h) At all material times, the Plaintiff also failed to make any application for the allotment of 400,000 PCM's shares or request for the sale of 200,000 PCM's shares by PCSM as stated in cl 5.4 of the JVA.

**[9]** The defendants state that the issues they raise are:

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(a) Whether all the conditions precedent under the joint venture agreement dated 29 November 1991 ('JVA') has been fulfilled.

(b) Whether the JVA has become null and void and unenforceable against the defendants due to the non-fulfilment of the conditions precedent in the JVA by the plaintiff.

I

THE PLAINTIFF

**[10]** The plaintiff averred that they signed the JVA relying on the representations made by the defendants that they agree to waive the conditions precedent which

required approval for Pioneer Industries Ltd (PIH) to hold 100% of PCSM and in turn for PCSM to hold 60% of PCM as long as PCSM was allowed to beneficially own 60% PCM and how they held the shares would be left to them, and PCSM agreed to be bound by the Industrial Coordination Act and the guidelines thereunder and such approvals that shall be given by the Government. With this condition being waived the JVA can become effective and binding upon the parties.

THE DISPUTE

**[11]** The crux of the dispute stems from para 5 of A1 the amended statement of claim which is as follows:

> The plaintiff avers and will aver on the date of signing of the JV as the defendants had unilaterally amended the terms of agreement by the inclusion of recital III, cll 2.1.1 (i), 2.1.3; 2.2 and 2.6 which provided for FIC approvals for PCSM to hold 60% of PCM as pointed out in the plaintiff's solicitors' letter of 29 November 1991, the plaintiff and Fijar refused to sign the same. However after the defendants' Mr Ronald Crocker had confirmed and assured them that the defendants agreed to the recitals III and cll 2.1.1 (i); 2.1.3; 2.2: and 2.6 being waived and would no longer be conditions precedent with the defendants undertaking to abide by the Industrial Coordination Act 1975 (ICA) and any guidelines issued by the Government and any approvals that may be given by the Government with regards to the first defendant's equity participation in the second defendant, the plaintiff and Fijar signed the said JV and accordingly there came into existence a collateral agreement with regards these matters.

**[12]** The defendants maintain:

(a) They did not waive recital III and cll 2.1.1.(i); 2.1.3; 2.2 and 2.6. of the JVA;

(b) That the contemporaneous documents and the parties conduct subsequent to the execution do not support the existence of the purported waiver;

(c) That the purported waiver was raised for the first time in PW3's witness statement of 21 June 2005 and as such contradicts PWB's witness statement dated 29 July 2002;

(d) That the plaintiff and Fijar were at all material times represented by Messrs Shearn & Delamore, and all changes and variations made to the JVA were made in writing after being properly advised by solicitors;

(e) The defendants' question, even assuming purported waiver existed, whether it is valid and binding on the defendants.

**[13]** An application was filed by the plaintiff at encl 64 to amend the pleadings. In *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 it was held by the Supreme Court that at pp 231–233:

> the principle underlying r 5 of O 20 is that by this rule the court may give leave to amend any pleadings even after the expiry of any relevant period of limitation. However leave to amend may be granted on terms to be imposed. Generally the order will be for the party who asked for the amendment to pay the costs of the application and incidentals thereto It is a guiding principle of cardinal importance on the question of amendment that generally

A speaking, all such amendments ought to be made 'for the purpose of determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *GL Bakar Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216 p 1231: [1958] 3 All ER 540 p 546).... It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding B otherwise than in accordance with their rights.... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, C it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right' (per Bowen U in *Cropper v Smith* [1883] 26 Ch D 700 pp 710–722. with which observations AL Smith U expressed 'emphatic agreement' in *Shoe Machinery Co v Cultam* [1896] 1 Ch 108 p 112).... In *Tildesley v Harper* [1876] 10 Ch D 393 pp 396–397 Bramwell U said: 'My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala D fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.' (The Supreme Court Practice 1985 para 20/5–8/6 p 340).

**[14]** The question sought to be added appeared relevant and could contribute to E determining the real question in the proceedings between the parties. No injustice that could not be compensated and made right by an order of costs was shown. The amendment was, therefore, allowed and the parties were directed to give priority to proceeding to disposal on the merits.

F FINDINGS

**[15]** The pre-condition that PIL be allowed to hold 100% of PCSM which would in turn hold 60% of PCM would effectively allow PIL to hold 60% of PCM directly. The interest of PIL was the production of pre-mixed concrete. Stepping back from the arguments by the parties, it is clear there is no suggestion that as a result of the G alleged failure of Grandbase to deliver upon the preconditions fully, PIL had been unable through the defendants to undertake the production and supply of pre-mixed concrete. In all events, the plaintiff Grandbase did deliver on a substantial number of carrier licenses. PIL and the defendants in effect enjoyed the opportunity and occasion to participate in the production and supply of pre-mixed concrete. H By shutting out the plaintiff Grandbase from the joint venture on the grounds of failure to deliver upon the pre-conditions, the PIL would have, in the time the business operated, not only 100% control of PCSM but also PCM, without the statutory approvals. As has been made clear by the response of MITI dated 22 June 1992, it required that 70% of PCM be held by Malaysians.

I **[16]** While it is true, therefore, that the joint venture as envisaged under the JVA could not be put into effect, PIL and the defendants were nevertheless able, under the guise of the structuring of the joint venture to embark upon the production and supply of pre-mixed concrete, with the efforts of the plaintiff to obtain approvals. Regardless of the fact of the absence of compliance with preconditions mandated by

law, the parties had in fact commenced upon the business activity as envisaged in the joint venture. For so long as that business was carried out by PIL and the defendants, PIL and the defendants cannot deny the plaintiff the share it would be entitled to if the approvals had been obtained.

**[17]** The plaintiff's claim was, therefore, allowed with costs.

*Plaintiff's claims allowed.*

Reported by Sally Kee